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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

MARK ROBERTI, Individually and
on Behalf of All Others Similarly
Situated,

Plaintiff,

v.

OSI SYSTEMS, INC., DEEPAK
CHOPRA, ALAN I. EDRICK, and
AJAY MEHRA,

Defendants.

Case No.: 2:13-cv-09174-MWF

CLASS ACTION

**LEAD COUNSEL'S NOTICE OF
MOTION AND MOTION FOR
AWARD OF ATTORNEYS' FEES
AND REIMBURSEMENT OF
LITIGATION EXPENSES;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Judge: Hon. Michael W. Fitzgerald
Courtroom: 1600
Date: December 7, 2015
Time: 10:00 a.m.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Court-appointed Lead Counsel Bernstein Litowitz Berger & Grossmann LLP (“Bernstein Litowitz”), having recovered \$15 million for the benefit of the Settlement Class, respectfully applies for an award of attorneys’ fees in the amount of 20% of the Settlement Amount (or \$3 million). Lead Counsel also seeks \$130,205.34 in reimbursement of Litigation Expenses it reasonably and necessarily incurred to prosecute the Action.

Throughout the litigation, the stakes have been large, the risks substantial, and the battles hard-fought. The likelihood of succeeding was highly uncertain. Lead Counsel nevertheless undertook this representation on a contingency basis, with no guarantee of success or recovery. Lead Counsel faced substantial risks establishing falsity, scienter, and loss causation; defeating defenses; proving damages; and establishing that a class action was appropriate for litigation purposes. Although Lead Counsel was able to conduct a thorough investigation sufficient to draft a detailed Complaint that overcame the heightened pleading standard of the Private Securities Litigation Reform Act of 1995 (the “PSLRA”), Defendants assuredly would have challenged the allegations again at both summary judgment and trial. Indeed, although the Court found that the Complaint’s allegations, when viewed holistically at the pleading stage, “sufficiently bolster the inference of scienter to survive the Motion to Dismiss,” the Court also noted that “none of the statements or evidence in the Amended Complaint independently establishes scienter.” *Roberti v. OSI Sys., Inc.*, 2015 WL 1985562, at *11 (C.D. Cal. Feb. 27, 2015).

As detailed in the accompanying DeLange Declaration, Lead Counsel vigorously pursued this litigation. Among other things, Lead Counsel conducted a comprehensive investigation to prepare the Complaint, including review and analysis of OSI’s public SEC filings; research and other reports by securities and financial analysts covering OSI and its business; OSI press releases and other public statements made by or about

1 Defendants; news articles and other media reports about OSI or its baggage and body
2 screeners; transcripts of OSI's earnings calls and investor and industry conferences; and
3 pricing, trading, and other data concerning OSI common stock, *see* DeLange Decl. ¶19.

4 Lead Counsel also identified and interviewed numerous percipient witnesses.
5 Lead Counsel opposed Defendants' motion to dismiss; engaged and consulted with
6 experts in several areas requiring specialized knowledge; researched the law applicable
7 to the claims and potential defenses; pursued discovery; filed a motion for and engaged
8 in a thorough mediation with experienced defense counsel and successfully negotiated a
9 favorable settlement. *See id.* Sections II and III.A.

10 Given the substantial recovery obtained for the Settlement Class, the complexity
11 and amount of work involved, the skill and expertise required, and the significant risks
12 that Lead Counsel undertook, the requested award of 20% of the Settlement Amount is
13 fair and reasonable. It is below the Ninth Circuit's 25% "benchmark," and consistent
14 with, or less than, fee awards in other similar cases. A lodestar cross-check confirms
15 that the requested fee, which represents a multiplier of less than 2.2, is fair and
16 reasonable. Moreover, Lead Plaintiff has reviewed and endorsed the fairness and
17 reasonableness of the requested fee. *See* Declaration of Arkansas State Highway
18 Employees Retirement System in Support of Final Approval of Class Action Settlement
19 and Plan of Allocation and an Award of Attorneys' Fees and Reimbursement of
20 Expenses ("ASHERS Decl." or "Lead Plaintiff Decl."), attached as Exhibit 1 to the
21 DeLange Decl.

22 As required by the Court's September 2, 2015 Preliminary Approval Order, the
23 Court-approved Notice was mailed to potential Settlement Class Members and their
24 nominees beginning on September 17, 2015. *See* Declaration of Adam D. Walter re
25 Notice Dissemination and Publication ("Walter Decl."), attached as Exhibit 2 to the
26 DeLange Decl. Over 35,000 Notices have been sent to potential Settlement Class
27 Members and their nominees. *See id.* ¶¶2-8. In addition, the Court-approved Summary
28 Notice was published in the *Investor's Business Daily* and over the *PR Newswire* on

September 24, 2015. *See id.* ¶9. Information regarding the Settlement has been made available through a toll-free telephone number established for the Settlement and posted on the website established by the Claims Administrator specifically for this Settlement, as well as on Lead Counsel’s website. *See id.* ¶¶10, 12; *see also* DeLange Decl. ¶43. The Notice advised Settlement Class Members that Lead Counsel would seek attorneys’ fees in an amount not to exceed 20% of the Settlement Amount, and reimbursement of Litigation Expenses in an amount not to exceed \$300,000. *See* Exhibit A to the Walter Decl., ¶¶5, 71.

Pursuant to the Preliminary Approval Order, the deadline for Settlement Class Members to file any objection to Lead Counsel’s fee and expense request is November 16, 2015. To date there are no objections.²

For the reasons set forth below, Lead Counsel respectfully requests that the Court approve its motion for attorneys’ fees and expenses.

II. THE REQUESTED FEES ARE FAIR AND REASONABLE

A. Lead Counsel Is Entitled To An Award Of Attorneys’ Fees From The Common Fund Obtained

The Supreme Court has recognized that “a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.” *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Indeed, the Supreme Court has emphasized that private securities actions, such as the instant Action, are “a most effective weapon” and “an essential supplement to criminal prosecutions and civil enforcement actions” brought by the SEC. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313, 318 (2007). The PSLRA also authorizes courts to award attorneys’ fees and expenses to counsel for the

² If any objections are received, Lead Counsel will address them in the reply papers to be filed on November 30, 2015.

1 plaintiff class provided the award does not exceed a reasonable percentage of the amount
2 of damages paid to the class. 15 U.S.C. § 78u-4(a)(6).

3 The Ninth Circuit has expressly approved the percentage-of-recovery approach,
4 which has become the prevailing method for awarding fees in common fund cases in the
5 Ninth Circuit. *See, e.g., Glass v. UBS Fin. Servs., Inc.*, 331 Fed. App'x 452, 456-57 (9th
6 Cir. 2009) (unpubl.) (overruling objection based on use of percentage-of-the-fund
7 approach); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1046 (N.D. Cal. 2008)
8 (recognizing that the “use of the percentage method in common fund cases appears to be
9 [the] dominant” method for determining attorneys’ fees).

10 The percentage-of-recovery method also decreases the burden imposed on courts
11 by eliminating a detailed and time-consuming lodestar analysis. *See In re Apple*
12 *iPhone/iPod Warranty Litig.*, 40 F. Supp. 3d 1176, 1181 (N.D. Cal. 2014); *In re*
13 *Activision Sec. Litig.*, 723 F. Supp. 1373, 1378-79 (N.D. Cal. 1989). Rather than
14 engaging in a full-blown lodestar analysis, courts employing the percentage method
15 sometimes use a less rigorous “lodestar cross-check” on the reasonableness of the
16 requested fee. *See, e.g., Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir.
17 2002) (affirming use of percentage method and application of lodestar method as a
18 cross-check); *Vincent v. Reser*, 2013 WL 621865 (N.D. Cal. Feb. 19, 2013) (using
19 percentage method with lodestar cross-check); *In re Nuvelo, Inc. Sec. Litig.*, 2011 WL
20 2650592 (N.D. Cal. July 6, 2011) (same). Regardless of which method is utilized, the
21 fees awarded must be fair and reasonable under the circumstances of a particular case.
22 *See In re Wash. Pub. Power Supply Sys. Sec. Litig.* (“WPPSS”), 19 F.3d 1291, 1295 (9th
23 Cir. 1994).

24 **B. Factors Considered By Courts In The Ninth Circuit Support**
25 **Approval Of The Requested Fee As Fair And Reasonable**

26 Courts in this Circuit consider the following factors when determining whether a
27 fee is fair and reasonable: (1) the results achieved; (2) the risks of litigation; (3) the skill
28 required and quality of work; (4) the contingent nature of the fee and financial burden

1 carried by the plaintiffs; (5) awards made in similar cases; (6) the reaction of the class;
 2 and (7) the amount of a lodestar cross-check. *See Vizcaino*, 290 F.3d at 1048-50;
 3 *Omnivision*, 559 F. Supp. 2d at 1046-48. Application of each of these factors confirms
 4 that the requested fee of 20% is fair and reasonable.

5 **1. The Results Achieved, In The Face Of**
 6 **Significant Risks, Support The Requested Fee**

7 Courts have consistently recognized that the settlement achieved is an important
 8 factor to consider in determining an appropriate fee award. *See, e.g., Omnivision*, 559 F.
 9 Supp. 2d at 1046; *see also Glass*, 331 Fed. App'x at 456-57. Here, Lead Counsel
 10 succeeded in obtaining a \$15 million cash Settlement for the Settlement Class. This
 11 achievement was the result of Lead Counsel's vigorous prosecution and settlement
 12 negotiations in the face of formidable risks. Consequently, the \$15 million recovered on
 13 behalf of the Settlement Class represents a substantial achievement that weighs in favor
 14 of granting the 20% fee.

15 Risk that continued litigation might result in the Settlement Class (and Lead
 16 Counsel) not receiving any recovery at all is another important factor in determining a
 17 fair fee award. *See, e.g., In re Heritage Bond Litig.*, 2005 WL 1594389, at *14 (C.D.
 18 Cal. June 10, 2005) ("The risks assumed by Class Counsel, particularly the risk of non-
 19 payment or reimbursement of expenses, is a factor in determining counsel's proper fee
 20 award."); *Omnivision*, 559 F. Supp. 2d at 1047; *WPPSS*, 19 F.3d at 1299-301.

21 If this Action had proceeded, numerous material uncertainties existed concerning
 22 liability and damages. The fraud alleged in this case centered around Rapiscan's body
 23 and baggage scanners. The Complaint alleges that Defendants made several false and
 24 misleading statements about OSI's body scanners and the Company's inability to
 25 develop the ATR software that the government required OSI to incorporate in the
 26 machines to address the privacy concerns caused by the "naked body images"
 27 (Complaint, ¶57) that the machines produced. Specifically, Lead Plaintiff alleges that
 28 even though OSI "never even got close" (*id.* ¶56) to solving the problems plaguing its

1 fruitless attempt to develop the ATR software, Defendants falsely and misleadingly told
2 investors that (i) the ATR software had completed testing, was “undergoing its final
3 testing as we speak” (*id.* ¶65), or was currently in testing, which could lead to more
4 sales, and (ii) everything was “business as usual” (*id.* ¶61) with respect to the body
5 scanners, and that the Company “expect[ed] that [TSA] will be looking at potential
6 orders within the next few months.” (*id.* ¶65). The Complaint further alleges that when
7 Defendants made these statements, they hid from investors that (i) the Company had
8 rigged the testing of machines with the new ATR software in order to conceal the
9 Company’s inability to develop the software, (ii) the Company was hopelessly behind
10 schedule in completing the software’s development, and (iii) the Company likely would
11 never be able to successfully develop the software.

12 The Complaint also alleges that Defendants made misleadingly positive
13 statements about their Department of Homeland Security (“DHS”) contacts for OSI’s
14 “bread-and-butter” baggage scanners (*id.* ¶¶77-79) without revealing that the Company
15 had improperly switched one of the scanner’s major components to an unapproved,
16 Chinese-made part without obtaining the required preapproval from DHS.

17 In order for Lead Plaintiff to prevail on these claims, Lead Counsel would have to
18 prove falsity, materiality, reliance, scienter, loss causation, and damages. As detailed in
19 the DeLange Declaration, each of these issues had been, and would continue to be,
20 vigorously contested. In the face of very serious risks, Lead Counsel was able to obtain
21 a certain and immediate recovery of \$15 million for the benefit of the Settlement Class.
22 The Settlement, which represents between 9% and 20% of maximum recoverable
23 damages, even assuming Lead Counsel was successful in proving Lead Plaintiff’s claims
24 through trial and appeal, far exceeds the median recovery as a percentage of estimated
25 damages.³

26
27
28 ³ Lead Counsel engaged a consultant to assist in estimating potentially recoverable
damages. Estimating aggregate damages can be challenging due to, among other things,

1 **2. The Skill Required And Quality Of Lead**
2 **Counsel's Work Performed Support The Requested Fee**

3 Another factor to consider in determining what fee to award is the skill required
4 and quality of work performed. *See Heritage Bond*, 2005 WL 1594389, at *12 (“The
5 experience of counsel is also a factor in determining the appropriate fee award.”). “The
6 ‘prosecution and management of a complex national class action requires unique legal
7 skills and abilities.’ [citation omitted]. This is particularly true in securities cases
8 because the [PSLRA] makes it much more difficult for securities plaintiffs to get past a
9 motion to dismiss.” *Omnivision*, 559 F. Supp. 2d at 1047.

10 Here, respectfully, the quality of Lead Counsel’s work performed – in the face of
11 the PSLRA’s heightened pleading standard – was extremely high. As set forth in

12
13 assumptions that must be made regarding trading activity. The estimate of potential
14 maximum recoverable damages in this case, assuming that Lead Plaintiff prevailed on all
15 claims and overcame all defenses, was at most roughly \$170 million. But that number
16 would be reduced or eliminated entirely if the Court or jury accepted some or all of
17 Defendants’ defenses, including their claims that a portion or all of the losses are
18 attributable to causes other than the alleged misstatements or omissions, or that certain
19 statements are not actionable. If, for example, Defendants proved that their alleged
20 misstatements about the baggage scanners were not false, damages could be reduced to
21 \$76 million. And if Defendants were able to persuade the Court or a jury that the
22 November 2012 and May 2013 announcements did not constitute corrective disclosures,
23 damages could be eliminated entirely. *See DeLange Decl.* ¶38. Even before accounting
24 for Defendants’ causation arguments and other defenses, the recovery of approximately
25 9% of the maximum recoverable damages is significantly higher than the 2.2% median
26 settlement recovery as a percentage of estimated damages in securities class actions in
27 2014, as reported by Cornerstone Research. If Defendants were successful in defeating
28 the December 2013 disclosures, as discussed herein, the Settlement is approximately
20% of the recoverable damages. *See Cornerstone Research*, “Securities Class Action
Settlements: 2014 Review and Analysis,” at p. 8, Figure 7, *available*
at [www.cornerstone.com/GetAttachment/701f936e-ab1d-425b-8304-8a3e063abae8/](http://www.cornerstone.com/GetAttachment/701f936e-ab1d-425b-8304-8a3e063abae8/Securities-Class-Action-Settlements-2014-Review-and-Analysis.pdf)
Securities-Class-Action-Settlements-2014-Review-and-Analysis.pdf; *see also* NERA,
“Recent Trends in Securities Class Action Litigation: 2014 Full-Year Review,” at p. 32,
Figure 27 (reporting a 0.7% median settlement value as a percentage of investor losses in
2014), *available* at [www.nera.com/content/dam/nera/publications/2015/PUB_2014_](http://www.nera.com/content/dam/nera/publications/2015/PUB_2014_Trends_0115.pdf)
Trends_0115.pdf.

1 greater detail in the DeLange Declaration, Lead Counsel extensively developed the
2 record by, among other things:

- 3 • Performing an in-depth review and analysis of: (i) OSI's public SEC
4 filings; (ii) research and other reports by securities and financial analysts
5 covering OSI and its business; (iii) OSI press releases and other public
6 statements made by or about Defendants; (iv) news articles and other
7 media reports about OSI or its baggage and body screeners; (v) transcripts
8 of OSI's earnings calls and investor and industry conferences; and
9 (vi) pricing, trading, and other data concerning OSI common stock, *see*
10 DeLange Decl. ¶19;
- 11 • Conducting a thorough investigation identifying and interviewing potential
12 percipient witnesses, including numerous former OSI employees, such as a
13 Senior Test Engineer at Rapiscan, a Director of International Programs at
14 Rapiscan, a Field Service Engineer for Rapiscan, a Director of Global
15 Sales Operations at Rapiscan, and a Vice President of Customer Service
16 for Rapiscan. Several of the witnesses are cited in the Complaint and
17 referenced in the Court's Order sustaining the Complaint as supporting the
18 inference of scienter, *see id.*;
- 19 • Consulting with economic and accounting experts on such issues as GAAP
20 accounting, financial reporting, causation, and damages, *see id.*;
- 21 • Drafting the detailed 103-page Complaint, sufficient to overcome the
22 PSLRA's heightened pleading standard, *see id.*;
- 23 • Preparing extensive briefing in response to Defendants' motion to dismiss,
24 *see id.* ¶20;
- 25 • Serving Lead Plaintiff's discovery requests on Defendants, including
26 seeking 35 categories of documents, and conferring with Defendants on
27 ways to resolve, or at least narrow, their disagreements over Defendants'
28

1 objections to the requests, including disputes over appropriate custodians,
 2 search terms, and relevant time frames, *see id.* ¶¶23, 25;

- 3 • Serving Freedom of Information Act requests on TSA and DHS, and
 4 reviewing, analyzing, and researching TSA and DHS assertions that many
 5 of the documents sought were TSA agency records that must be sought
 6 through a “*Touhy* request” sent to DHS’s office of General Counsel, and
 7 that many of the documents constituted or contained SSI that TSA would
 8 not allow Defendants to produce under any circumstances, *see id.* ¶24;
- 9 • Reviewing and analyzing documents produced by Defendants, including
 10 organization charts for various OSI divisions and subsidiaries, minutes of
 11 meetings of OSI’s board of directors and audit committee, corporate-
 12 governance guidelines, management representation letters, internal
 13 financial presentations, documents concerning executive compensation,
 14 press releases and back-up materials for press releases, anti-corruption
 15 compliance manuals and policies, various iterations of OSI’s codes of
 16 ethics and conduct, and copies of applicable insurance policies, *see id.* ¶25;
- 17 • Reviewing and responding to Defendants’ discovery requests, including
 18 searching for and collecting responsive documents, *see id.* ¶22;
- 19 • Drafting Lead Plaintiff’s motion for class certification, supported by an
 20 expert report, *see id.* ¶27; and
- 21 • Drafting Lead Plaintiff’s mediation statements, preparing for and
 22 participating in the mediation and subsequent negotiations, *see id.* ¶¶28-30.

23 The attorneys at Bernstein Litowitz are among the most experienced and skilled
 24 practitioners in the securities litigation field, and the firm has a long and successful
 25 track record of prosecuting securities cases throughout the country – including within
 26
 27
 28

1 this District.⁴ Lead Counsel's reputation as experienced and competent counsel in
 2 complex class action cases, both willing and able to litigate the case to resolution,
 3 facilitated Lead Counsel's ability to negotiate the Settlement, ultimately resulting in the
 4 \$15 million recovery for the Settlement Class.

5 The quality and vigor of opposing counsel are also important in evaluating the
 6 services rendered by Lead Counsel. *See, e.g., Barbosa v. Cargill Meat Solutions Corp.*,
 7 297 F.R.D. 431, 449 (E.D. Cal. 2013). Throughout the litigation and settlement
 8 negotiations, Defendants have been represented by very skilled and highly-respected
 9 counsel at Latham & Watkins, including the former global Chair of its Litigation
 10 Department, who brought considerable experience and expertise to bear and spared no
 11 effort in the defense of their clients.

12 Judge Phillips explains:

13 [T]he advocacy on both sides of the case was outstanding. I have
 14 experience with the principal attorneys working on this case for Lead
 15 Plaintiff (from the law firm of Bernstein Litowitz Berger & Grossmann
 16

17 ⁴ For example, Bernstein Litowitz has obtained recoveries on behalf of investors in
 18 securities class action litigation in this Circuit, alone – both before and after trial – in
 19 amounts totaling over \$1 billion. *See, e.g., In re Maxim Integrated Prods., Inc. Sec.*
 20 *Litig.*, 08-00832-JW (N.D. Cal.) (\$173 million settlement); *In re Connetics Sec. Litig.*,
 21 07-02940 SI (N.D. Cal.) (\$12.75 million); *In re New Century*, 07-cv-00931 (FMOx)
 22 (C.D. Cal.) (\$125 million); *In re Int'l Rectifier Corp. Sec. Litig.*, 07-02544-JFW (C.D.
 23 Cal.) (\$90 million); *In re Gemstar-TV Guide Int'l Inc. Sec. Litig.*, 02-CV-2775-MRP
 24 (C.D. Cal.) (\$92.5 million); *In re Wells Fargo Mortg.-Backed Certificates Litig.*, 09-
 25 CV-1376-LHK (N.D. Cal.) (\$125 million); *In re McKesson HBOC, Inc. Sec. Litig.*, 99-
 26 CV-20743 RMW (N.D. Cal.) (over \$1.04 billion); *In re Wash. Mut., Inc. Sec. Litig.*, 07-
 27 cv-1809 (W.D. Wash.) (\$208.5 million); *In re Toyota Motor Corp. Sec. Litig.*, CV 10-
 28 922 DSF (C.D. Cal.) (\$25.5 million); *In re Sunpower Sec. Litig.*, CV 09-5473-RS (N.D.
 Cal.) (\$19.7 million); *In re Dendreon Corp. Class Action Litig.*, C11-01291JLR (W.D.
 Wash.) (\$40 million); *In re Clarent Corp. Sec. Litig.*, Master File No. C-01-3361-CRB
 (N.D. Cal.) (obtaining plaintiff verdict at trial against CEO for knowing violation of
 federal securities laws). *See also* Firm Resume of Lead Counsel, attached to the
 DeLange Decl. as Exhibit 4-D.

LLP) and for Defendants (from the law firm of Latham & Watkins LLP) from other cases I have mediated. I was familiar with the effort, creativity, and zeal they put into their work. I expected that they would represent their respective clients in the same manner here, as they did. All counsel displayed the highest level of professionalism in carrying out their duties on behalf of their respective clients. The settlement is the direct result of all counsel's experience, reputation and ability in these types of cases.

Phillips Decl. ¶14.

In the face of this knowledgeable and formidable defense, Lead Counsel was nonetheless able to develop a case that was sufficiently strong to overcome the heightened pleading standard of the PSLRA, and persuade Defendants, and their insurance carriers, to settle on terms that are favorable to the Settlement Class.

3. The Contingent Nature Of The Fee And The Financial Burden Carried By Lead Counsel Support The Requested Fee

The Ninth Circuit has confirmed that a determination of a fair and reasonable fee must include consideration of the contingent nature of the fee and the obstacles surmounted in obtaining the settlement.⁵ It is an established practice in the private legal market to reward attorneys for taking on the serious risk of non-payment by permitting a fee award that reflects over their normal hourly rates for prevailing in contingency cases. *See Nuvelo*, 2011 WL 2650592, at *2 (citing *WPPSS*, 19 F.3d at 1299). "This practice encourages the legal profession to assume such a risk and promotes competent representation for plaintiffs who could not otherwise hire an attorney." *Id.*

Here, Lead Counsel received no compensation during the two years since the initial complaint was filed. During that time, Lead Counsel invested nearly 2,500 hours

⁵ *WPPSS*, 19 F.3d at 1299; *see In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 2007 WL 2416513, at *1 (N.D. Cal. Aug. 16, 2007); *see also Omnivision*, 559 F. Supp. 2d at 1047.

for a total lodestar of over \$1.36 million, and incurred reasonable and necessary expenses of approximately \$130,000 in prosecuting the case. *See* Nicholas Decl., attached as Exhibit 4 to the DeLange Decl. Additional work in connection with the Settlement and claims administration will also be required. Lawyers working on the case have also forgone the business opportunity to devote time to other cases. *See Vizcaino*, 290 F.3d at 1050. Any fee award has always been at risk, and completely contingent on the result achieved and on this Court’s discretion in awarding fees and expenses. Unlike defense counsel – who typically receive payment on a timely basis whether they win or lose – Lead Counsel sustained the entire risk that it would have to fund the expenses of this Action and that, unless Lead Counsel succeeded, it would not be entitled to any compensation whatsoever. The contingent nature of the representation, and the burden carried by Lead Counsel, support the requested fee.

4. The Requested Fee Is Consistent With Or Less Than Awards Made In Similar Cases

Lead Counsel’s requested fee of 20% is less than the Ninth Circuit’s 25% “benchmark” for common fund cases, and below fee percentages regularly awarded in securities class action settlements in the Ninth Circuit and elsewhere. *See, e.g., Glass*, 331 Fed. App’x at 457; *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029 (9th Cir. 1998) (referring to 25% in attorneys’ fees as a “benchmark award”); *see also Buccellato v. AT&T Operations, Inc.*, 2011 WL 3348055, at *1 (N.D. Cal. June 30, 2011) (recognizing Ninth Circuit’s 25% benchmark, surveying cases and granting 25% fee award). Indeed, “in most common fund cases, the award exceeds that benchmark.” *Activision*, 723 F. Supp. at 1377-78 (surveying securities cases nationwide and noting, “[t]his court’s review of recent reported cases discloses that nearly all common fund awards range around 30%”).⁶

⁶ *See also, e.g., Vizcaino*, 290 F.3d at 1048-50 (affirming fee award of 28% of \$96.9 million settlement fund); *Omnivision*, 559 F. Supp. 2d at 1047 (approving 28% fee

Courts have repeatedly awarded fees of 25% or more – more than the 20% requested here – where a settlement was reached during the pendency of a motion to dismiss or shortly after, and where no or very limited formal discovery had been obtained as a result of the PSLRA discovery stay. *See, e.g., In re Int’l Rectifier Corp. Sec. Litig.*, CV 07-02544-JFW (C.D. Cal.), ECF No. 316 (granting fee award of 25% of settlement fund obtained in securities class action prior to substantial formal discovery); *Oh v. Chan*, CV 07-04891 DDP (C.D. Cal.), ECF No. 99 (granting fees equaling 25% of settlement fund obtained in securities class action prior to a ruling on defendants’ motion to dismiss); *cf. Glass*, 331 Fed. App’x at 457 (affirming award of 25% where settlement reached early, noting “the favorable timing of the settlement”). Indeed, one of the merits of awarding fees on a percentage basis is that it does not penalize attorneys for achieving a prompt resolution of a case, where, as here, sufficient information about the value of the claims could be determined through investigation and careful analysis of the legal and factual issues, thus avoiding the need for costly and lengthy formal discovery. *See Aichele v. City of Los Angeles*, 2015 WL 5286028, at *5 (C.D. Cal. Sept. 9, 2015) (“Many courts and commentators have recognized that the percentage of the available

award in securities class action) (citing *Activision*, 723 F. Supp. at 1377-78); *Waldrep v. ValueClick, Inc.*, CV 07-5411 DDP (C.D. Cal.), ECF No. 160 (granting fees equaling 25% of settlement fund in securities class action); *In re Sunpower Sec. Litig.*, CV 09-5473-RS (N.D. Cal.), ECF No. 270 (awarding fees of 25% of \$19.7 million settlement fund); *Oh v. Chan*, CV 07-04891 DDP (C.D. Cal.), ECF No. 99 (granting fees equaling 25% of settlement fund in securities class action); *In re Int’l Rectifier Corp. Sec. Litig.*, CV 07-02544 JFW (C.D. Cal.), ECF No. 316 (granting fees equaling 25% of settlement fund in securities class action); *In re THQ, Inc. Sec. Litig.*, CV 00-01783-JFW (C.D. Cal.), ECF No. 128 (granting fees equaling 30% of the settlement amount in a securities class action); *In re CV Therapeutics, Inc. Sec. Litig.*, 2007 WL 1033478, at *2 (N.D. Cal. Apr. 4, 2007) (approving 30% fee award in securities class action); *In re Informix Corp. Sec. Litig.*, 1999 U.S. Dist. LEXIS 23579, at *6 (N.D. Cal. Nov. 23, 1999) (awarding 30% of \$132 million settlement fund in securities class action); *Silva v. Banco Popular N. Am.*, CV 08-06300-JFW (C.D. Cal.), ECF No. 42 (granting fees equaling 28% of the class settlement fund); *Knight v. Red Door Salons, Inc.*, 2009 WL 248367, at *6 (N.D. Cal. Feb. 2, 2009) (approving 30% fee award).

fund analysis is the preferred approach in class action fee requests because it more closely aligns the interests of the counsel and the class, *i.e.*, class counsel directly benefit from increasing the size of the class fund and working in the most efficient manner.”) (citing *Vizcaino*, 290 F.3d at 1050 n.5 (“it is widely recognized that the lodestar method creates incentives for counsel to expend more hours than may be necessary on litigating a case so as to recover a reasonable fee, since the lodestar method does not reward early settlement.”)).

5. The Reaction Of The Settlement Class Supports The Requested Fee

The reaction of the class to a proposed settlement and fee request is a relevant factor in approving fees. *See Red Door Salons*, 2009 WL 248367, at *7; *Omnivision*, 559 F. Supp. 2d at 1048. Here, pursuant to the Court’s Preliminary Approval Order, beginning on September 17, 2015, the Court-approved Notice was disseminated to more than 35,000 potential Settlement Class Members and their nominees, and the Summary Notice was published in the *Investor’s Business Daily* and over the *PR Newswire* on September 24, 2015. *See* Walter Decl., ¶¶2-9. The Notice informed Settlement Class Members that Lead Counsel would seek fees in an amount not to exceed 20% of the Settlement Amount, and reimbursement of Litigation Expenses in an amount not to exceed \$300,000. *See* Exhibit A to the Walter Decl., ¶¶5, 71. The Notice further advised Settlement Class Members of, among other things, their right to object to Lead Counsel’s request for attorneys’ fees and Litigation Expenses. To date, there are no objections, further supporting the requested fee. *See, e.g., Red Door Salons*, 2009 WL 248367, at *7 (no objection supports 30% award); *Omnivision*, 559 F. Supp. 2d at 1048 (only three objections supports 28% award).

6. A Lodestar Crosscheck Confirms That The Requested Fee Is Reasonable

Although courts in this Circuit typically apply the percentage approach to determine attorneys’ fees in common fund cases, courts may perform an informal

1 lodestar cross-check on the percentage method. *See Glass v. UBS Fin. Servs., Inc.*, 2007
 2 WL 221862, at *16 (N.D. Cal. Jan. 26, 2007) (“Under the circumstances presented here,
 3 where the early settlement resulted in a significant benefit to the class, the Court finds no
 4 need to conduct a lodestar cross-check.”), *aff’d Glass*, 331 Fed. App’x at 456-57 (“In
 5 reviewing the award of attorneys’ fees, the district court properly performed an informal
 6 lodestar cross-check, and noted the relatively low time-commitment by plaintiff’s
 7 counsel”; affirming district court’s 25% fee award over objection).

8 In *Vizcaino*, the Ninth Circuit noted that as follows:

9 “[C]ourts have routinely enhanced the lodestar to reflect the risk of non-
 10 payment in common fund cases. . . . This mirrors the established practice in
 11 the private legal market of rewarding attorneys for taking the risk of
 12 nonpayment by paying them a premium over their normal hourly rates for
 13 winning contingency cases.” . . . In common fund cases, “attorneys whose
 14 compensation depends on their winning the case[] must make up in
 15 compensation in the cases they win for the lack of compensation in the
 16 cases they lose.”

17 290 F.3d at 1051 (citation omitted). There, the Ninth Circuit affirmed a fee awarded that
 18 equaled 28% of the settlement fund and a multiplier of 3.65, which the court found to be
 19 “within the range of multipliers applied in common fund cases.” *Id.*; *see also*
 20 *Buccellato*, 2011 WL 3348055, at *1 (awarding 25% fee, representing a 4.3 multiplier).

21 As detailed herein and in the accompanying DeLange Declaration, the work Lead
 22 Counsel performed in this matter wholly supports the Court’s approval of Lead
 23 Counsel’s request for a fee award of 20% of the Settlement Amount, or \$3 million.⁷

24
 25
 26 ⁷ As is customary in seeking a percentage-of-the-fund award in common fund cases and
 27 submitting data for a lodestar cross-check, included with Lead Counsel’s declaration is a
 28 schedule identifying the lodestar of Bernstein Litowitz (by individual, position, billing
 rate, and time billed). *See, e.g., In re ECOTality, Inc. Sec. Litig.*, 2015 WL 5117618, at
 *4 (N.D. Cal. Aug. 28, 2015) (“The lodestar crosscheck calculation need entail neither

1 Lead Counsel devoted 2,492.25 hours to this Action, amounting to a lodestar of
 2 \$1,364,905.00.⁸ Thus, Lead Counsel's fee request represents a multiplier of less
 3 than 2.2 of Lead Counsel's total lodestar. This modest multiplier falls within the range
 4 of multipliers for awards in other complex securities cases within this Circuit.

5 In sum, Lead Counsel's attorneys' fee request is well within the range, or below,
 6 what courts in this Circuit commonly award in complex securities class actions, whether
 7 calculated as a percentage of the settlement fund or in relation to Lead Counsel's
 8 lodestar – and warrants the Court's approval.

11 mathematical precision nor bean counting [courts] may rely on summaries
 12 submitted by the attorneys and need not review actual billing records.”). Unlike the full
 13 lodestar method, when conducting a lodestar crosscheck, “the hours documented by
 14 counsel need not be exhaustively scrutinized by the district court.” *In re WorldCom, Inc.*
Sec. Litig., 388 F. Supp. 2d 319, 355 (S.D.N.Y. 2005).

15 ⁸ See DeLange Decl. ¶63; see also Nicholas Decl. Exhibit 4-A. The hourly rates are the
 16 same as, or comparable to, the rates submitted by Bernstein Litowitz for lodestar cross-
 17 checks in other securities class action litigation for fee applications that have been
 18 granted, including within this Circuit. See, e.g., *In re Dendreon Corp. Class Action*
 19 *Litig.*, 11-cv-01291 (JLR) (W.D. Wash. 2013) (ECF No. 103-4); *In re Sunpower Sec.*
 20 *Litig.*, CV 09-5473-RS (N.D. Cal. 2013) (ECF No. 261-3); *In re Wells Fargo Mortg.-*
 21 *Backed Certificates Litig.*, 09-cv-1376-LHK (N.D. Cal. 2011) (ECF No. 453-4); see also
 22 *Pension Trust Fund for Operating Eng'rs v. Assisted Living Concepts, Inc.*, 12-CV-884-
 23 *JPS* (E.D. Wisc. 2013) (ECF No. 76-3); *In re Bear Stearns Mortg. Pass-Through*
 24 *Certificates Litig.*, 08-cv-08093-LTS (S.D.N.Y. 2015) (ECF No. 273-6); *In re Morgan*
 25 *Stanley Mortg. Pass-Through Certificates Litig.*, 09-cv-2137 (KBF) (S.D.N.Y. 2014)
 26 (ECF No. 328); *Plumbers' & Pipefitters' Local #562 Supplemental Plan & Trust v. J.P.*
 27 *Morgan Acceptance Corp. I*, 08-cv-1713 (PKC) (E.D.N.Y. 2014) (ECF No. 222-5). In
 28 addition, it appears based on studies, including one conducted by the National Law
 Journal, that Bernstein Litowitz's billing rates are comparable to, or less than that, of
 defense counsel in this case, Latham & Watkins LLP. See, e.g., National Law Journal,
 “Billing Rates Across the Country” (Jan. 13, 2014), available at
[http://www.nationallawjournal.com/id=1202636785489/Billing-Rates-Across-the-](http://www.nationallawjournal.com/id=1202636785489/Billing-Rates-Across-the-Country)
Country (reporting Latham & Watkins partner billing rates ranging from \$895 to \$1,110,
 and associate billing rates ranging from \$465 to \$725).

1 **III. LEAD COUNSEL’S EXPENSES ARE REASONABLE**

2 Lead Counsel also requests reimbursement of its Litigation Expenses in the
3 amount of \$130,205.34 incurred in prosecuting and resolving the Action on behalf of the
4 Settlement Class. Attorneys who create a common fund for the benefit of a class are
5 entitled to be reimbursed for their out-of-pocket expenses incurred in creating the fund
6 so long as the submitted expenses are reasonable, necessary and directly related to the
7 prosecution of the action. *See Omnivision*, 559 F. Supp. 2d at 1048 (“Attorneys may
8 recover their reasonable expenses that would typically be billed to paying clients in non-
9 contingency matters.”).

10 From the outset, Lead Counsel was aware that it might not recover any of its
11 expenses or, at the very least, would not recover anything until the Action was
12 successfully resolved. Lead Counsel also understood that, even if the case was
13 ultimately successful, reimbursement for expenses would not compensate it for the lost
14 use of funds advanced to prosecute the Action. Thus, Lead Counsel was motivated to,
15 and did, take significant steps to minimize expenses wherever practicable without
16 jeopardizing the vigorous and efficient prosecution of the Action. *See DeLange Decl.*
17 ¶77.

18 The expenses for which Lead Counsel seeks reimbursement are detailed in the
19 accompanying sworn Nicholas Declaration, attached as Exhibit 4-B to the DeLange
20 Declaration, setting forth the specific category of expenses incurred and the amount.
21 The types of expenses for which Lead Counsel seeks reimbursement are necessarily
22 incurred in litigation and routinely charged to clients billed by the hour. These include
23 expenses associated with, among other things, service of process, online legal and
24 factual research, travel, experts and consultants, and mediation. *See, e.g., Vincent*, 2013
25 WL 621865, at *5 (granting reimbursement of costs and expenses for “three experts and
26 the mediator, photocopying and mailing expenses, travel expenses, and other reasonable
27 litigation related expenses”); *Red Door Salons* 2009 WL 248367, at *7 (granting
28 reimbursement because “[a]ttorneys routinely bill clients for all of these expenses”).

1 A large component of Lead Counsel's expenses, over 66%, is for the costs of
 2 experts and consultants, including the retention of experts with significant experience
 3 opining on damages, loss causation, and market efficiency in securities class actions. In
 4 prosecuting the claims, Lead Counsel worked extensively with experts and consultants.
 5 *See DeLange Decl.* ¶79.

6 The expenses also include the costs of online research in the amount of
 7 \$24,205.47. These are the charges for computerized factual and legal research services
 8 such as *LexisNexis*, *Westlaw*, and PACER. It is standard practice for attorneys to use
 9 these resources to assist them in researching legal and factual issues, and, indeed, courts
 10 recognize that these tools create efficiencies in litigation and, ultimately, save clients and
 11 the class money. *See id.* ¶80.

12 The Notice informed potential Settlement Class Members that Lead Counsel
 13 would apply for reimbursement of Litigation Expenses in an amount not to exceed
 14 \$300,000. *See Exhibit A to the Walter Decl.*, ¶¶5, 71. The amount of expenses for
 15 which reimbursement is now sought, \$130,205.34, is less than one-half of the maximum
 16 amount stated in the Notice. To date, no Settlement Class Member has objected.

17 **IV. CONCLUSION**

18 Lead Counsel respectfully requests that the Court award it attorneys' fees in the
 19 amount of 20% of the Settlement Amount, and reimbursement of its Litigation Expenses
 20 in the amount of \$130,205.34, plus interest earned at the same rate and for the same time
 21 period as the Settlement Fund, to be paid from the Settlement Fund.

22 Dated: November 2, 2015

Respectfully submitted,

23 BERNSTEIN LITOWITZ BERGER
 24 & GROSSMANN LLP

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